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No. 94-___

IN THE

Supreme Court of the United States

October Term, 1994

ELIZABETH RIDGEWAY, *et al.*,

Petitioners,

v.

PFIZER, INC., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where it appears that the Third, Seventh and Ninth Circuits would have reached a different result, did the Sixth Circuit err when it held that, because they had not been granted formal status as intervenors, unnamed class members who objected to the certification and approval of the settlement of a class action under Fed.R.Civ.P. 23(b)(3) had no standing to appeal *any* order entered by the district court, including an order denying their Fed.R.Civ.P. 60(b)(3) motion challenging the approval of the settlement, and seeking to establish fraud and misconduct in the procurement of the settlement's approval?

2. Where neither the Notice To The Class ordered by the district court, nor the manner in which the district court conducted the Fairness Hearing proceedings it convened to consider whether it should approve the settlement of a Rule 23(b)(3) class action *even suggested* that the grant of intervention under Fed.R.Civ.P. 24 was a condition for unnamed class members to participate in the proceedings or to appeal final orders entered by the district court that determined the rights of the class members, did the Sixth Circuit err when it dismissed for lack of standing the appeal of the denial of a Rule 60(b)(3) motion filed by unnamed class members who had actively participated in the Fairness Hearing proceedings as objectors, and who had been treated by the district court and all parties implicitly as parties or *de facto* intervenors?

3. Where the district court denied a motion filed by unnamed class members under Fed.R.Civ.P. 60(b)(3) while another motion of the unnamed class members filed under Fed.R.Civ.P. 59(e) seeking reconsideration of the district court's denial of their motion to intervene under Fed.R.Civ.P. 24 was still pending and undecided, did the Sixth Circuit err in dismissing the appeal of the denial of the Rule 60(b)(3) motion on the ground that the class members had not intervened, and in refusing to remand to the district court for a decision on the outstanding Rule 59(e) motion?

PARTIES TO THE PROCEEDING

In addition to petitioners Elizabeth Ridgeway, Rosemary Grunsby, and Fred Grunsby, each of whom appeared as Class Members-Appellants in the Sixth Circuit proceeding, respondents Arthur Ray Bowling, *et al.*, appeared as Plaintiffs-Appellees and respondents Pfizer, Inc. and Shiley Incorporated appeared as Defendants-Appellees before the Sixth Circuit.

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The order of the United States Court of Appeals for the Sixth Circuit dismissing petitioners' appeal is reproduced in the petitioners' appendix at 1a (there is no official citation to this order).

JURISDICTION

The judgment of the court of appeals was entered on August 8, 1994. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This petition arises out of the procedures employed by a district court in its certification of a class and approval of a settlement of a class action certified under Fed.R.Civ.P. 23(b)(3) involving 50,000 to 100,000 heart-valve implantees who reside all over the world.[1] Petitioners are unnamed class members who complied fully with the district court's order notifying them of the steps to take to object to, and participate in the "Fairness Hearing" the court convened under Fed.R.Civ.P. 23(c)(2) and (e) to consider the approval of the class certification and settlement that had been proposed by the parties. In keeping with the court's order and established Sixth Circuit precedent, petitioners did not move formally to intervene in the case prior to the district court's decision approving the settlement. Moreover, the district court did not require petitioners to intervene and accepted their compliance with its order as sufficient for petitioners to have standing to file briefs, take discovery, introduce evidence and participate in the Fairness Hearing the same as the named parties. When petitioners appealed the district court's

1. The district court had jurisdiction pursuant to 28 U.S.C. § 1332. For the Court's convenience, copies of the district court's opinion approving the settlement, is reported at 143 F.R.D. 141 (S.D. Ohio 1992). This petition does not seek review of the merits of that decision, but rather of the Sixth Circuit's order dismissing petitioners' appeal for lack of standing of the denial of a motion filed under Fed.R.Civ.P. 60(b)(3) that challenged the approval of the class action settlement on grounds of fraud and misconduct by the proponents of the settlement in the procurement of the approval.

order certifying the class and approving the settlement, the Sixth Circuit issued an unpublished order dismissing their appeal on the ground that, because the district court had not formally granted petitioners the status of intervenors under Fed.R.Civ.P. 24, they lacked standing to appeal. 7a. This contradicted the Sixth Circuit's own prior published decisions, and deepened an already vast split among the federal circuits with respect to the question presented in this case — *i.e.*, whether unnamed class members who respond to a notice from the court inviting them to participate in Fairness Hearing proceedings concerning a proposed class certification under Rule 23(b)(3), and a proposed settlement, must intervene in order to have standing to appeal final orders entered by the district court that determine their rights as unnamed class members.

Petitioners are Elizabeth Ridgeway and Rosemary Grunsby, who were included in the class definition because both had implanted in them "Bjork-Shiley" heart valves manufactured and distributed by respondents Pfizer, Inc. and its wholly owned subsidiary, Shiley Incorporated (collectively, "Pfizer"), and because Fred Grunsby is the husband of Rosemary.

Approximately five years before this instant federal action was filed, petitioners had instituted their own lawsuit against Pfizer as the named plaintiffs in a class action in a Pennsylvania state court seeking compensatory and punitive damages against Pfizer on behalf of a class of implantees with a nexus to Pennsylvania. *Taylor v. Shiley,* Court of Common Pleas, First Judicial District of Pennsylvania, Civil Trial Division (Philadelphia) February Term, 1986, No. 2087. The *Taylor* case is still pending in the Pennsylvania court, but it is in suspense awaiting the outcome of the instant federal action.

The *Taylor* action is significant because, whereas Pfizer had succeeded in obtaining dismissals of similar heart-valve cases in other state law jurisdictions on various common law grounds, the court in *Taylor* had upheld petitioners' causes of action for fraud, intentional infliction of emotional distress, and breach of warranty under Pennsylvania law. *See Bowling,* 143 F.R.D. at 147. Thus, unlike class members in the *Bowling* case whose claims would be governed by adverse state law decisions of their

own jurisdictions, the members of the Pennsylvania class in *Taylor* were well situated to obtain recoveries against Pfizer. Unfortunately, the state court in *Taylor* had elected to consider simultaneously both petitioners' motion for class certification and Pfizer's motion for summary judgment that raised substantive defenses based on Pfizer's version of the facts. This required the parties to undertake extensive and time consuming merits discovery (involving six million documents) before the court would even address petitioners' motion for class action certification and notice to the class. As shown below, the *Taylor* putative class has still not received notice of the pendency of the *Taylor* class action.

On March 28, 1991, while discovery on Pfizer's summary judgment motion was actively being pursued in *Taylor*, a Cincinnati law firm ("Class Counsel") filed a class action complaint in the United States District Court for the Eastern District of Kentucky that alleged a putative class consisting of all persons in the United States with Pfizer's 60-degree heart valves. *Wright v. Pfizer*, CA. No. 91-58 (E.D. Ky. March 18, 1991). Less than one month later, and with the concurrence of Pfizer, Class Counsel forum shopped, abandoned the Kentucky case, *see* 143 F.R.D. at 148, and filed the identical complaint in federal court in Cincinnati as the *Bowling* case, on behalf of the same named plaintiffs (but adding one Ohio resident), seeking certification of the identical class. RA 1.[2] Both of these filings were without the knowledge of petitioners, although Pfizer, the common defendant in *Wright*, *Bowling* and *Taylor* knew that a competing class action was pending in *Taylor*, awaiting class certification.

Shortly after the filing of the complaint in *Bowling*, without any meaningful discovery or investigation having been undertaken on behalf of the class (*See*, *Bowling* 143 F.R.D. at 161), Class Counsel and Pfizer privately agreed to stipulate to class certification and settle the case. On November 19, 1991, Class Counsel and Pfizer's lawyers met in a secret, in-chambers

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2. Citations to "RA" are to the record on appeal filed with the Sixth Circuit (Case No. 92-3973) in connection with petitioners' earlier appeal of the district court's decision approving the *Bowling* settlement.

conference with the district court, described the settlement, discussed Class Counsel's expected $20 million counsel fee and had the record of the meeting sealed to avoid prompting too many objections from class members if the news of the settlement leaked out too early.[3] On January 23, 1992, the district court signed a perfunctory order conditionally certifying a class under Fed. R. Civ. P. 23(b)(3) that is much broader in scope than the class alleged in the complaint and which, by stipulation of counsel, now includes in its sweep all recipients of 60-degree heart valves and recipients of a different product than any named plaintiff has – 70-degree heart valves – and their spouses, wherever they might reside, anywhere on earth. *Compare* RA 1 (class action complaint) *with* RA 43 (notice of class action settlement).

In February of 1992, petitioners received the Notice to the Class ordered by the court, and learned that a federal district court in Ohio had certified a global class under Fed. R. Civ. P. 23(b)(3) that overlapped with the class they were seeking in their class action motions pending in *Taylor*. The Notice to the Class in *Bowling* informed unnamed class members that they could not object to the class certification or the proposed settlement if they elected to opt out of the class and that, if they wanted to object or participate in the Fairness Hearing, they or their attorney must file an appearance. There was no statement in the Notice that class members would have to intervene to have standing to participate in the Fairness Hearing or to appeal any ruling concerning the settlement or the Fairness Hearing proceedings. *Id.* The *Bowling* Notice to the Class also said nothing about the *Taylor* class action that was pending simultaneously for the benefit of thousands of persons included within the sweep of the *Bowling* class definition with a nexus to Pennsylvania. RA 43.

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3. The transcript (RA 33) on motion of petitioners and other objectors was unsealed immediately prior to the start of the Fairness Hearing. It is significant that Class Counsel and counsel for Pfizer deliberately withheld informing the district court about the pendency of the *Taylor* class action, notwithstanding the requirements of Fed.R.Civ.P. 23(b)(3)(B) (RA 33).

The *Bowling* Notice to the Class was a complete surprise to petitioners since Pfizer had notified neither them nor the judge in Pennsylvania that Pfizer (a party-defendant in *Taylor*) had agreed to settle an overlapping class that would effectively terminate the rights of the putative class members in *Taylor* who did not opt out of *Bowling*. As noted above, the Pennsylvania court in *Taylor* had not yet reached the point of ruling on the class certification motion in *Taylor* or of ordering notice to the *Taylor* class. In addition, petitioners did not know the names and addresses of the putative class members in *Taylor* because Pfizer had refused to provide this information in discovery. As a result, the thousands of putative class members in *Taylor* had no way of knowing that they had a potentially attractive alternative to the proposed settlement described in the *Bowling* Notice to the Class.

Petitioners, in their dual role as named plaintiffs in the *Taylor* class action, and unnamed class members in *Bowling*, were faced with the dilemma of whether to opt out of the *Bowling* class or remain in as objectors. As a result of the district court's order in *Bowling*, if petitioners opted out of the *Bowling* class, they couldn't object to class certification, the *Bowling* settlement, or participate in the Fairness Hearing, with the result that thousands of putative class members in *Taylor* (who for the reasons explained above did not know about the benefits *Taylor* offered as an alternative to the *Bowling* settlement) would have their causes of action against Pfizer extinguished by virtue of the judgment and settlement in *Bowling*. Petitioners, therefore, had a fiduciary responsibility to protect the rights of the members of the putative Pennsylvania class whom they sought to represent in *Taylor* that required them to comply with the district court's conditions for standing to object and participate at the Fairness Hearing. This meant petitioners could not opt out.

On May 5, 1992, petitioners filed timely appearances and written objections to the proposed settlement, the only requirements for standing to participate in the Fairness Hearing that had been established by the district court in *Bowling*. RA 72, 143. Thereafter, with no objection from Pfizer or Class Counsel, and without seeking to intervene under Rule 24, petitioners

were allowed by the district court to participate fully in all aspects of the Fairness Hearing proceedings and related matters. *See Bowling*, 143 F.R.D. at 146.[4]

Petitioners saw no reason to intervene in the district court proceedings. The class notice established conditions for standing that contradicted intervention, and two published decisions of the Sixth Circuit held that intervention is not necessary to confer standing on an objecting class member. *See Sertic v. Cuyahoga Lake, Etc., Carpenters District Council*, 459 F.2d 579 (6th Cir. 1972); *Cohen v. Young*, 127 F.2d 721 (6th Cir. 1942).[5] At no point during the course of the Fairness Hearing did the district court, Pfizer, or Class Counsel suggest that intervention was necessary or appropriate. Also, there were numerous other unnamed class members who were represented by their own counsel and objected at the Fairness Hearing; and none of the other objectors thought intervention was appropriate either. In fact, at every juncture in the proceedings, the district court confirmed by its actions that intervention was not required. (*See*, e.g., RA 256.)

Petitioners did not confine their objections to the benefits of the settlement. In addition, and with greater emphasis,

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4. Thus, petitioners: (a) filed and obtained rulings on numerous substantive and procedural matters, RA 83, 97, 113, 140, 145, 158, 168, 190, 202, 206-208, 211, 216, 229, 235, 230, 250, 221; (b) obtained in response to their written and oral motions an explicit written order granting their right to be heard and to participate in the Fairness Hearing, *see Bowling*, 143 F.R.D. at 147, RA 229, 250; (c) made substantive oral presentations and arguments at each settlement-related hearing and proceeding, RA 97, 113, 140, 158, 202, 207, 208, 251; (d) were permitted to cross-examine and to question experts who had made presentations on behalf of the proponents of the settlement, RA 202; (e) took written discovery of Class Counsel and respondents, RA 83, 229; (f) marked numerous exhibits and introduced into the record affidavits and other evidence, RA 143, 190, 202, 208; (g) were invited to, attended, and participated in status conferences and hearings, RA 158; (h) raised issues and obtained court action on matters that were peculiar to petitioners, and were not raised by other parties, RA 143, 159, 190, 218, 221, 229, 210, 145, 168, 206, 211, 235, 250; and (i) had their Philadelphia-based counsel admitted *pro hac vice* and appeared as well through local counsel, RA 84, 99, 230, 272.

5. As explained *infra* at Point III, two major treatises on class action procedure and two other courts of appeals also identified the Sixth Circuit as not requiring class members to intervene as a condition of appeal.

petitioners pressed the point that the district court was not complying with Rule 23; the district court was not exercising the proper scrutiny and should have allowed an evidentiary hearing because of the facts on the record of forum shopping, collusion, failure of Class Counsel to take discovery and the apparent attempt by the proponents of the settlement to mislead the court and the class; and the defects in the notice to the class. Moreover, petitioners, without success, moved repeatedly in the district court to certify a subclass of Pennsylvania residents. *See Bowling*, 143 F.R.D. at 161; RA 159, 190, 207, 208, 221, 251. The basis for petitioners' request for a subclass was that the Pennsylvania court in *Taylor* had entered an order denying essentially the same motion to dismiss on which Pfizer had obtained favorable rulings in other courts. Yet, according to the proponents of the settlement, it was the impact of these rulings that justified the meager benefits provided in the settlement. Therefore, in petitioners' view, the putative class in *Taylor* had an advantage over class members in *Bowling* who were in jurisdictions bound by earlier adverse rulings. Petitioners asked also that the portion of the *Bowling* class that overlapped with the putative class in *Taylor* be given a new notice to inform them of their options.

On August 19, 1992, the district court issued an opinion and order in which it certified a final settlement class under Rule 23(b)(3) and approved the settlement. The district court's opinion was devoted primarily to a discussion of the issues and arguments raised by petitioners concerning their attack on the adequacy of representation, and asserted violations of Rule 23. *Bowling*, 143 F.R.D. at 151.[6]

Petitioners filed a prompt notice of appeal to the Sixth Circuit on September 17, 1992. RA 258. A few days after filing

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6. The text of the reported opinion in *Bowling* begins at 143 F.R.D. 145 and ends on page 170. Page 145 describes some, but not all, of the written documents, pleadings, objections and motions petitioners had filed. The court described petitioners as "the Green firm," since petitioners' lead attorney was Gary Green, Esq. Thereafter, the court concentrated on matters raised by or pertaining to the Green firm on page 146 and from pages 151 through 167. Hence, *18* pages of the district court's opinion related to the participation of petitioners both before, during, and at the conclusion of the Fairness Hearing.

the notice of appeal, however, petitioners were informed that Pfizer intended to file a motion to dismiss the appeal, and to raise for the first time in the history of the case the ground that petitioners had not formally intervened. Solely as a protective measure, petitioners filed in the district court on September 25, 1992, a motion to intervene in aid of their appeal. RA 265. On October 21, 1992, petitioners filed an amended motion to intervene. Petitioners requested that, if the district court granted their motion to intervene, the date of the court's order relate back to the date on which petitioners entered their appearance in *Bowling*. RA 288. By order dated November 9, 1992, the district court declined to rule on petitioners' intervention motions on the ground that the filing of the notice of appeal had created "uncertainty" about the court's continuing jurisdiction over the case.

On March 2, 1993, while the appeal was pending, petitioners filed a fact based motion under Fed.R.Civ.P. 60(b) showing new evidence that had surfaced concerning fraud and misconduct by the proponents of the settlement in procuring approval of the settlement. Petitioners' Rule 60(b)(3) motion raised issues relating to the respondents' deliberate and fraudulent withholding of crucial information from the district court during the Fairness Hearings. The motion referenced newly uncovered facts about, *inter alia,* Class Counsel's misrepresentations to the district court concerning the extent of the documents and other material he had access to and reviewed prior to agreeing to the terms of the settlement; Pfizer's providing the district court with misleading and false information concerning the status of Pfizer's medical research activities; respondents' purposeful hiding from the district court and the class facts concerning Pfizer's agreements and negotiations (contemporaneous with the Fairness Hearing) to settle cases of individuals who had opted out of the class for more than $100,000 each; respondents' cover-up of Pfizer's fraud on the Food and Drug Administration covering Pfizer's manufacturing activities; and Pfizer's non-disclosure to the district court of the United States Department of Justice's criminal and civil investigation into Pfizer's acts of fraud in connection with its heart valve activities. Each of these matters, if known at the Fairness Hearing, would have tended to prove a

collusive settlement, and that the proponents had intentionally misled the court about crucial facts on which the court's settlement approval rested.

On March 2, 1993, Pfizer moved to dismiss petitioners' appeal of the order certifying the class and approving the settlement, on the ground that petitioners lacked standing to appeal because they had not formally intervened in the case. Meanwhile, Petitioners' motions under Rule 24 and Rule 60(b)(3) remained *in limbo* in the district court.

In a two-paragraph order dated December 21, 1993, marked "Not Recommended for Full Text Publication", the Sixth Circuit dismissed petitioners' appeal, "[b]ecause the appellants are unnamed class members who neglected to intervene in the proceedings below, they lack standing to pursue the appeal." 7a. The unpublished order did not mention the Sixth Circuit's prior decisions in *Cohen* and *Sertic*.

In another order issued on December 21, 1993, the Sixth Circuit affirmed the district court's decision declining to rule on petitioners' motion to intervene. *See* 14 F.3d 600 (Table) (1994), reprinted at 10a.

Petitioners then petitioned for rehearing *en banc* of the Sixth Circuit's order dismissing their appeal of the settlement's approval arguing, *inter alia*, that the panel's unpublished order contradicted two published Sixth Circuit decisions — *Cohen* and *Sertic* — and that by dismissing their appeal in an unpublished order, the panel had taken the extraordinary step of creating a non-precedent-setting ruling that contradicted published Sixth Circuit decisions, thereby depriving petitioners of their right to due process under the U.S. Constitution. In a two-paragraph order dated March 4, 1994, the Sixth Circuit denied the petition for rehearing. 8a.

Petitioners then filed a petition for a Writ of Certiorari which was denied on October 3, 1994. 9a.

As noted, during the time of the initial appeal, there were two undecided motions pending in the district court: a motion under Rule 60(b)(3) and a motion under Rule 24 seeking intervention. On April 5, 1994, the district court finally ruled on petitioners' pending motion to intervene (which had been pending since September 25, 1992). The district court denied

petitioners' motion on the sole ground that "the substantial delay between the approval of the settlement and return of the case to this Court, and the fact that intervention at this point would be prejudicial to the class . . . .". 6a. On April 13, 1994, petitioners filed a motion pursuant to Rule 59(e) and Rule 24(a) and (b) of the Federal Rules of Civil Procedure seeking reconsideration of the denial of their motion to intervene.

While petitioners' Rule 59(e) motion (seeking reconsideration of the denial of intervention) was still pending, the district court, on April 12, 1994 entered an order denying petitioners' Rule 60(b)(3) motion that had been filed in November 1993. 5a. The district court characterized petitioners' Rule 60(b)(3) motion as "a motion to reconsider this court's approval of the settlement agreement in this class action". 5a. Without addressing any of the proofs of fraud and misconduct raised in the 60(b)(3) motion, the court denied the motion based solely on "the interest of justice". 5a. With the time for appealing the denial of the Rule 60(b)(3) motion about to expire, on May 3, 1994, petitioners were forced to file a notice of appeal from that decision, even though petitioners' Rule 59(e) motion (seeking reconsideration of the denial of intervention) was still undecided by the district court.[7]

On May 17, 1994, the Sixth Circuit, *sua sponte,* issued an order directing petitioners to show cause why their appeal of the denial of their 60(b)(3) motion should not be dismissed for lack of standing due to their failure to intervene. 3a. Petitioners responded and requested that the Sixth Circuit stay and/or hold in abeyance the appeal, and that the case be remanded to the

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7. Petitioners would have preferred to have had a ruling on their Rule 59(e) motion (that asked the district court to reconsider its denial of intervention) before they filed the appeal of the district court's denial of their Rule 60(b) motion. However, because petitioners did not know that the district court had denied their Rule 60(b) motion (the Rule 59(e) motion and the district court's April 5, 1994 order denying the Rule 60(b)(3) motion crossed in the mail), and petitioners had no choice about the timing of the filing of the appeal of the denial of their Rule 60(b)(3) motion, they could not yet appeal the denial of intervention. Accordingly, the question of whether petitioners would be allowed to intervene was still an open question at the time petitioners filed their appeal of the denial of their 60(b)(3) motion.

district court for further proceedings on the petitioners' Rule 59(e) motion (seeking reconsideration of the denial of intervention), which was still unresolved in the district court.

On August 8, 1994, the Sixth Circuit dismissed the petitioners' appeal of the denial of their Rule 60(b) motion on the ground that "[h]aving been denied intervenor status in this case, it follows that the appellants also lack standing to appeal the denial of the Rule 60(b) motion." 1a. The Sixth Circuit also denied as moot petitioners' request for a remand back to the district court. 1a.

As of this date, petitioners' Rule 59(e) motion is still pending in the district court. On October 11, 1994, petitioners filed a motion in the district court requesting that the court rule on that outstanding motion.

In their appeal to the Sixth Circuit of the district court's denial of petitioners' Rule 60(b) motion, they asserted the district court failed to follow the proper procedures in evaluating petitioners' motion, thus turning its head away from fraud that injured the class and the integrity of Rule 23. *See,* petitioners' "Statement of Issues on Appeal" filed in the Sixth Circuit. 12a. The result of the Sixth Circuit's ruling is that apparent gross acts of fraud and collusion by the proponents of the settlement have first escaped any scrutiny by the district court and then escaped any review by an appellate court. The impact on the absent class members is palpable.[8] The Sixth Circuit's ruling also undermines the predictability of the law and is calculated to deprive millions of unnamed class members in future cases of the protections of Rule 23.

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8. For example, as in *Taylor*, a California court has upheld a cause of action for fraud against Pfizer. *Khan v. Shiley, Inc.*, 217 Cal. App. 3d 848, 266 Cal. Rptr. 106 (4th Dist. 1990), *review denied*, 1990 Cal. LEXIS 1952 (May 3, 1990). As a result, nearly 1,000 class members opted out of *Bowling* to pursue their individual heart valve claims against Pfizer in California. According to news reports, at least 340 of these individuals ultimately obtained settlements in excess of $100,000 per pre-fracture implantee. *See* "$31-Million Settlement May Be in Works on Shiley Heart Valve", *Los Angeles Times*, p. D1 (October 17, 1992). The putative *Taylor* class could very well have achieved comparable recoveries in Pennsylvania if the district court had not denied petitioners' motion to certify a Pennsylvania sub-class and approved the *Bowling* settlement.

REASONS FOR GRANTING THE WRIT

I. There Is A Deep And Confusing Split In The Circuits As To Whether Unnamed Class Members Of A Settlement Class Certified Under Fed.R.Civ.P. 23(b)(3) Must Formally Move And Be Permitted to Intervene In Order To Appeal Final Orders Affecting Their Interests.

The first reason the writ should be granted is to resolve the deep split among the circuits on the precise question presented in this case: whether an unnamed class member who was permitted to participate in the district court Fairness Hearing proceedings without intervening and who contends that the district court and the proponents of the settlement violated Rule 23 in connection with a class action certification and settlement must formally move and be permitted to intervene in the case to have standing to appeal final orders growing out of the Fairness Hearing. The circuit courts themselves acknowledge the split, the confusion and how each circuit is drawing different conclusions from the rulings of the other circuits.

For example, the Tenth Circuit in *Gottlieb v. Wiles,* 11 F.3d 1004, 1010, n.5 (10th Cir. 1993) disagreed with the Third Circuit's analysis of the views of the Fifth, Eighth and Eleventh Circuits as expressed in *Carlough, et al. v. Amchem Prod. Inc., et al.* 5 F.3d 707 (3d Cir. 1993).

The Sixth Circuit in *Shults, et al. v. Champion International Corporation,* 1994 WL 509053 (6th Cir. 1994) explicitly recognized the deep split on this issue and lack of agreement in the circuit courts. ("In *Guthrie,* for example, the case that appears to be the progenitor of the modern trend in the federal courts in this *unsettled* area of the law, the Eleventh Circuit held in 1987 that a non-named class member does not have standing to appeal the final judgment in a class action.") (emphasis added).

This unsettled nature of the issue is apparent in the Seventh Circuit's opinion in *In the Matter of VMS Ltd. Partnership Sec. Litig.,* 976 F.2d 362 (7th Cir. 1992), where the court held that an unnamed class member has standing to appeal from the approval of a settlement of a class action in response to a Rule 23(e) notice, but did not have standing to appeal a post-settlement order

implementing the settlement agreement. Moreover, in *VMS*, the court ignored the distinctions between Rule 23(b)(1), 23(b)(2) and 23(b)(3) cases notwithstanding the significance the Seventh Circuit gave them in its prior decision in *Research Corp. v. Asgrow Seed Co.*, 425 F.2d 1059 (7th Cir. 1970). Adding to the confusion is the Tenth Circuit's observation that the Seventh Circuit would eventually adopt the holding in *Guthrie*, despite the Seventh Circuit's statement in *VMS* that, "[W]e offer no opinion on the merit of *Guthrie's* principle as applied to an unnamed class member who appeals the approval of a consent decree." *Gottlieb*, 11 F.3d at 1012. *See also, Croyden Associates v. Alleco, Inc.*, 969 F.2d 675, 678 (8th Cir. 1992) (circuits are divided on issue and some have inconsistent holdings whether an unnamed class member has standing to appeal an order approving settlement). *See generally* Timothy A. Duffy, *The Appealability of Class Action Settlements by Unnamed Parties*, 60 U. Chi. L. Rev. 933, 934-40 (1993) (discussing circuit split). Only review by this Court will ensure uniformity in the procedure to be followed by an absent class member who wishes to preserve an opportunity for appellate review.

Three federal courts of appeals – the Third, Seventh, and Ninth Circuits – have consistently allowed objecting, nonintervening class members to appeal approvals of settlement agreements.[9] These circuits' decisions are in accordance with

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9. *Third Circuit: Carlough, et al. v. Amchem*, 5 F.3d 707, 714 (1993) (denial of objecting class members' intervention motion not immediately appealable under collateral order doctrine since intervention would not be required to appeal merits of settlement); *Ace Heating & Plumbing Co., Inc. v. Crane Co.*, 453 F.2d 30, 33 (1971) (nonintervening, objecting class members have standing to appeal class action settlement). *Cf. Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304, 1310 (1993) (nonintervening, objecting shareholders have standing to appeal approval of settlement in a derivative suit).

Seventh Circuit: Armstrong v. Board of School Directors, 616 F.2d 305, 327-28 (1980) (nonintervening, objecting class members have right to appeal from a class action judgment); *Patterson v. Stovall*, 528 F.2d 108, 109 n.1 (1976) (nonintervening, objecting class members have standing to appeal settlement agreement); *Research Corp. v. Asgrow Seed Company*, 425 F.2d 1059, 1060 (1970) (nonintervening class member who appears in response to Rule 23(e) notice and objects to a settlement has right to appeal from an adverse judgment). *Cf. In the Matter of VMS Ltd. Partnership Sec. Litig.*, 976

the explanation of current law set forth in all three of the leading treatises on class action procedure in the federal courts. *See* James W.M. Moore, 3B *Moore's Federal Practice*, ¶ 23.80[5], at 23-496 (Matthew Bender, 1993) ("[a] member of a class who appears in response to the court's notice given pursuant to [Rule 23(e)], and objects to the dismissal or compromise has a right to appeal from an adverse final judgment although he did not become a formal party of record.") (footnote omitted); Herbert Newberg & Alba Conte, 1 *Newberg on Class Actions*, § 1.04, at 1-13 (McGraw Hill, 3d ed. 1992) ("[c]ertainly class members are parties for purposes of . . . objecting to and appealing from an order approving a class settlement . . ."); Charles A. Wright, *et al.*, 7B *Federal Practice and Procedure*, § 1797, at 360-61 (West, 2d ed. 1986) ("[o]f course, if the class member appears in response to the notice and puts forth his objections, he can attack the dismissal or compromise on appeal from the entry of the final judgment.") (footnote omitted).

The decisions holding that unnamed class members have standing to appeal a settlement's approval recognize that an appeal is often the only mechanism by which an absent class member can protect his or her rights. *See generally Ace Heating*, 453 F.2d at 33. Permitting class members to opt out of class actions does not provide adequate protection, since, in reality, "many small claimants frequently have no litigable claims unless aggregated." *Id.* Absent a right to appeal, "such

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NOTES *(Continued)*

F.2d 362, 368 (1992) (unnamed class member must intervene in order to appeal post-settlement order implementing settlement agreement; distinguishing *Research Corp.* on factual grounds, but acknowledging its continued viability with respect to appeals of decisions approving settlements).

Ninth Circuit: In re Cement Antitrust Litig., 688 F.2d 1297, 1309 (1982) ("a class member may appeal from an order approving a settlement to which the member objects"), *aff'd*, 459 U.S. 1191 (1983); *Dosier v. Miami Valley Broadcasting Corp.*, 656 F.2d 1295, 1299 (1981) (dissatisfied class member could have challenged settlement by direct appeal); *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1176 (1977) (unnamed class members appealing from the district court's approval of a class action settlement had "legal rights affected by the settlement and [thus] has standing to sue").

claimants would be faced with equally unpalatable alternatives — accept either nothing at all or a possibly unfair settlement." *Id.*

The Tenth Circuit has embraced a hybrid view. In *Gottlieb v. Wiles* 11 F.3d 1004, 1012 (10th Cir. 1993), the court held that unnamed class members in a Rule 23(b)(3) action have standing, even absent an order allowing intervention, to raise claims of due process violations in the notice to the class. *Id.*, 11 F.3d at 1012, as well as claims of violations of the Rule 23 procedures intending to protect the rights of unnamed class members. *Id.*, 11 F.3d at 1009, 1010. On the other hand, under the Tenth Circuit's rule, if the unnamed class member objects only to the adequacy of the settlement, he must be granted intervenor status to gain standing to appeal. *Id.*, 11 F.3d at 1012.[10]

In contrary authority, the Fifth, Eighth, and Eleventh Circuits have held in Rule 23(b)(2) class actions that nonintervening class members lack standing to appeal an order approving a settlement.[11] But other circuits have extended these holdings to Rule 23(b)(3) cases as the Sixth Circuit did here. *See, Gottlieb,* 11 F.2d at 1012.

The confusion stems in part from the fact that the progenitor cases for the "no standing rule", *Guthrie,* an Eleventh Circuit case, and *Walker,* a Fifth Circuit case, both grew out of a long Fifth Circuit tradition in Rule 23(b)(2) class actions of

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10. As noted, petitioners here did not raise a claim based solely on the adequacy of the settlement when they challenged the approval of the settlement in their Rule 60(b) motion.

11. *Fifth Circuit: Loran v. Furr's/Bishop's Inc.,* 988 F.2d 554, 554 (1993) (appellate court lacks jurisdiction to consider appeal by class member who has not attempted to intervene as a named party); *Walker v. City of Mesquite,* 858 F.2d 1071, 1074 (1988) (unnamed members of certified plaintiff class lacked standing to challenge consent decree approving a settlement between the named parties).

Eighth Circuit: Croyden Assocs. v. Alleco, Inc., 969 F.2d 675, 679 (1992) ("unnamed class members who object to a settlement must move to intervene, and they will be denied standing to appeal when they have not done so"), *cert. denied,* 113 S. Ct. 1251 (1993).

Eleventh Circuit: Guthrie v. Evans, 815 F.2d 626, 627 (1987) ("a class member who is not a named plaintiff [ ] does not have standing to appeal the final judgment in [a] class action.")

requiring – but always allowing – intervention by objecting, unnamed class members as a condition to establish standing in injunctive relief cases. *See, Woolen v. Surtran Taxi Cabs, Inc.*, 684 F.2d 324, 332-333 (5th Cir.1982) for a discussion of the Fifth Circuit's historical rule in 23(b)(2) cases. In *Woolen,* the court noted that a class member in a Rule 23(b)(3) class would be treated differently since if he feels he is not getting adequate representation, he could elect to either "opt out under 23(c)(2) or to enter an appearance through counsel of his choosing". 684 F.2d at 332. The obvious implication is that in a Rule 23(b)(3) case brought in the Fifth or Eleventh Circuit, if an unnamed class member's counsel entered his appearance, the class member would have standing to appeal. Thus in *In re Dennis Greenman Securities Litigation,* 829 F.2d 1539 (11th Cir. 1987), the Eleventh Circuit allowed an appeal by a nonintervening, unnamed class member in a Rule 23(b)(3) class action. *In re Dennis Greenman* was decided by the Eleventh Circuit in October of 1987 while the Eleventh Circuit issued its opinion in *Guthrie,* a Rule 23(b)(2) case in April of 1987; and Judge Hill was a panel member in both cases. Therefore, it appears that the Sixth, Eighth and Tenth Circuits that purport to rely on *Guthrie* and *Walker* may have misapplied or expanded the essence of their holdings.

As other courts and commentators have pointed out, a rule requiring formal intervention by every class member who objects to a settlement will surely render class actions *more* unwieldy than simply permitting objecting class members to appeal. *See* Duffy, *The Appealability of Class Action Settlements by Unnamed Parties,* 60 U. Chi. L. Rev. at 954. *See also infra* at Point II.B. (discussing fallacy underlying claim that rule requiring intervention increases judicial efficiency).

Prior to the decisions in this case denying standing to petitioners, the Sixth Circuit's view accorded with that of the Third, Seventh, and Ninth Circuits. Subsequently, the Sixth Circuit, in *Shults v. Champion International Corporation,* 1994

WL 509053 (6th Cir. 1994) (September 20, 1994), finally published an opinion which purports to both embrace the no-standing rule, but not overrule its earlier, and directly contrary opinions in *Sertic,* 459 F.2d at 579 and *Cohen,* 127 F.2d at 721.[12]

But, the Sixth Circuit in *Shults* further confused its position by proceeding to address and decide, *on the merits,* the claim that the class representatives afforded the unnamed class member-appellants in *Shults* inadequate representation. *Id.* at 5. Hence, the Sixth Circuit apparently would allow an unnamed class member who had not been granted formal intervenor status standing to appeal if: (a) he could prove factually a violation of Fed.R.Civ.P. 23(a)(4) (adequacy of representation); (b) if the words of the notice to the class invited the unnamed class members to "show cause why a proposed settlement should not be approved" (*Id.* at 3; *Cohen, supra.*); or (c) if a motion for intervention was denied and reversed on appeal (*Id.* at 5; *Sertic*). "But a mere voluntary appearance to state or file objections is an insufficient basis for standing to appeal." *Id.* at 5.

It is obvious that the courts of appeals are deeply split on the issue presented in this case, and the whole area of class action jurisprudence has lost its moorings. Part of the problem can be traced to this Court's decision in *Marino v. Ortiz,* 484 U.S. 301 (1988) (per curiam), a Title VII lawsuit in which a consent decree approving a settlement was challenged by individuals who were not parties to the litigation. (The certified class consisted of *Hispanic* police officers who claimed that a civil service examination they were required to take caused a disparate impact in promotion decisions. A group of *white* police officers who were neither members of the class nor of any of the groups of other white officers who *had* moved to intervene

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12. The *Shults* panel noted that one panel of its court could not overrule the decision of a prior panel, and therefore, *Sertic* and *Cohen* could not be restricted by the opinion in *Shults.* However, the court then went on to limit these cases strictly to their facts, and held that *Cohen* allowed an unnamed class member standing to appeal only if he was "hauled into court" *Id.* at 3, and *Sertic* provided standing only if the class member were successful in appealing a denial of intervention. *Id.*

appealed the settlement eventually reached between the class and the city.) This Court affirmed the dismissal of their appeal, stating that, "because petitioners were not parties to the underlying lawsuit, and because they failed to intervene for purposes of appeal, they may not appeal from the consent decree approving the lawsuit's settlement." 484 U.S. at 304.

In the view of some circuit courts, *Marino* "provide[s] substantial support for holding that unnamed class members who object to a settlement must move to intervene, and they will be denied standing to appeal when they have not done so." *Croyden*, 969 F.2d at 679; *see also Walker*, 858 F.2d at 1074. Other courts and commentators have disagreed, noting that, because the objectors in *Marino* were not even members of the class, that decision did not "settle [ ] whether an objecting member of the class or derivative litigation who is not a named party may appeal the court's approval of the compromise." *Bell Atlantic*, 2 F.3d at 1307; *see also* Duffy, *The Appealability of Class Action Settlements by Unnamed Parties*, 60 U. Chi. L. Rev. at 946 (despite *Marino*, "lower courts . . . have decided that a nonparty may sometimes appeal without prior intervention") (footnote omitted) (collecting cases); N.E. Paolini, *Recent Development: Walker v. City of Mesquite: The Nonappealability of Class Action Consent Decrees by Non-named Class Members*, 63 Tul. L. Rev. 1732 (June 1989) ("[t]he *Walker* court . . . dramatically broadened the *Marino* holding to include non-named class members.")

Petitioners submit that *Marino* has no application here, since that case did not in any way address the issue of standing of a *bona fide* class member who participated vigorously throughout the district court proceedings to appeal a ruling directly affecting his or her rights. In any event, *Marino* has not eliminated or resolved the preexisting disagreement among the circuits as to the rights of unnamed class members to appeal judgments that directly affect their interests. *See, e.g., Carlough*, 5 F.3d at 714 (post-*Marino* decision holding that objecting class members may appeal decision approving settlement without intervening); *cf. Bell Atlantic Corp.*, 2 F.3d at 1310 (post-*Marino* decision discussing deep split in circuits and

holding that nonintervening, objecting shareholders have standing to appeal approval of settlement of derivative action). The writ should be granted so as to resolve that confusion and protect members of future classes from being caught in the same trap of conflicting precedent that snared petitioners in this case.

II. This Case Presents Two Important Questions Of Federal Law That Have Not Been, But Should Be, Decided By This Court.

Review is also warranted because this case presents two important questions of federal law that should be decided by this Court. First, must an unnamed member in a 23(b)(3) class intervene to have standing to appeal final orders from a Fairness Hearing that resolve his rights? Second, does such a class member have standing to appeal under Fed.R.Civ.P. 60(b)(3) even if he is not deemed to be a "party"?

The questions presented are important because requiring intervention does not simply impose an additional paperwork burden on objecting class members. To the contrary, this requirement has the practical effect of drastically limiting the availability of appellate review of class certification decisions, the integrity of the settlement approval process, and of the merits of class action settlements. At the same time, the intervention requirement greatly increases the burdens of class action litigation on class members and the courts – precisely the opposite result of what the intervention rule ostensibly was intended to achieve.

A. The Intervention Requirement Unduly Limits Objecting Class Members' Rights To Appeal.

The most egregious effect of the intervention requirement is that it operates greatly to restrict the availability of appellate review of both class certification decisions and the merits of class

action settlements.[13] Without such review, there is no meaningful procedural check on the actions of district courts. Yet this check is especially critical in the class action context, where there is an inherent danger that unnamed class members' rights may be compromised in favor of the interests of the class representatives (or their attorneys). As the district court itself noted in *Bowling*, "[t]he possibility of collusion exists in class actions. A defendant has an interest in minimizing its liability; Class Counsel has an interest in his attorney's fee." 143 F.R.D. at 152 (citing John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action,* 54 U. Chi. L. Rev. 877, 883-89 (Summer 1987)). In order to protect against such collusion, the Federal Rules of Civil Procedure require district courts to evaluate the fairness of proposed class action settlements before they can be implemented. *See* Fed. R. Civ. P. 23(e). However, absent appellate review, "even the most conscientious and diligent judge may be tempted to overlook what are often eleventh hour objections to settlements . . .." Duffy, *The Appealability of Class Action Settlements by Unnamed Parties,* 60 U. Chi. L. Rev. at 947. Thus, any rule limiting appellate review of class action settlements increases the potential for unfair, collusive settlements that are not in the best interests of the class. This is precisely the result the drafters of Rule 23 sought to avoid by prohibiting the dismissal or compromise of class actions without judicial approval.

Appellate review is equally important with respect to class certification decisions. This Court has recognized that "actual, not presumed, conformance with [the certification requirements of] Fed. R. Civ. P. 23(a) remains . . . indispensable." *General Telephone Company of Southwest v. Falcon,* 457 U.S. 147, 160 (1982). One essential way to ensure that the "actual conformance" standard has been met is to permit appellate review of

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13. Although the Supreme Court has never held that due process requires appellate review of lower court decisions, *see, e.g., Lindsey v. Normet,* 405 U.S. 56, 77 (1972), Congress has conferred appellate jurisdiction on the courts of appeals from "all final decisions of the district courts." 28 U.S.C. § 1291.

certification decisions. *Id.* Any restrictions on the availability of such review invites district courts to deviate from the certification requirements on which absent class members' rights depend — a result directly contrary to this Court's decision in *Falcon.*[14]

Many class members will simply fail to intervene, either because they are not represented by counsel or are unaware that intervention is required in order to preserve their rights to appeal.[15] More importantly, even objectors who *do* move to intervene may be deprived of their opportunity to appeal a class certification or a settlement's approval by adverse decisions on their intervention motions. Rule 24 of the Federal Rules of Civil Procedure provides for two types of intervention: intervention as of right and permissive intervention. Intervention as of right is available only if the proposed intervenors demonstrate that they are not being adequately represented by existing parties. *See Bradley v. Milliken,* 828 F.2d 1186, 1191 (6th Cir. 1987). Satisfying this requirement is extremely difficult under *any* circumstances;[16] it is even harder where, as here, a proposed

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14. In this case, for example, a major portion of petitioners' first appeal argued that the district court's certification of the *Bowling* class fell far short of "actual conformance" with Rule 23. Yet the Sixth Circuit's dismissal of petitioners' appeal effectively rendered the certification decision absolutely immune from scrutiny. Similarly, the dismissal of petitioners' appeal of the denial of their Rule 60(b)(3) motion (the subject of this petition) allowed proven allegations of fraud and misconduct to remain unscrutinized or reviewed, despite their obvious impact on Rule 23(a)(4)'s requirements.

15. The danger that class members will unwittingly forfeit their appellate rights is made more likely where, as in this case, the class notice places stringent conditions on the right to participate in the district court proceedings that do *not* include the need to file a motion to intervene. RA 43.

16. In general, "the applicant for intervention bears the burden of demonstrating inadequate representation." *Meyer Goldberg, Inc. v. Goldberg,* 717 F.2d 290, 293 (6th Cir. 1983). This requires "overcom[ing] the presumption of adequacy of representation that arises when a proposed intervenor and a party to the suit . . . have the same ultimate objective." *Wade v. Goldschmidt,* 673 F.2d 182, 186 n.7 (7th Cir. 1982) (per curiam). An applicant for intervention fails to meet its burden of demonstrating inadequate representation "when no collusion is shown between the representative and an opposing party, when the representative does not have or represent an interest adverse to the proposed intervenor, and when the representative has not failed

settlement is reached prior to class certification, and a conditional settlement class is certified without the district court having considered the adequacy of representation. Intervention motions can be expected to fail at this stage because there is a presumption (especially after a court has certified a conditional settlement class, as was done here) that all class members' interests are represented adequately, "against which the petitioner must demonstrate adversity of interest, collusion or non-feasance." *International Tank Terminals, Ltd. v. M/V Acadia Forest,* 579 F.2d 964, 967 (5th Cir. 1978) (quoting *Virginia v. Westinghouse Elec. Corp.*, 542 F.2d 214, 216 (4th Cir. 1976)). Making such a demonstration on what little information that can be gleaned from the Rule 23(e) Notice to the Class is difficult, if not impossible, especially if the forum court is hundreds or thousands of miles away from the class members. Thus, as a practical matter, intervention as of right could easily be denied in cases where the class action is settled at an early stage of the litigation.

In addition, in its opposition to petitioners' motion to intervene in this case, Pfizer argued that intervention as of right is actually *foreclosed* when the class action has been certified under Rule 23(b)(3), which gives absent class members the right to opt out. *See Woolen v. Surtran Taxicabs, Inc.*, 684 F.2d 324, 332 (5th Cir. 1982); *Alaniz v. California Processors, Inc.*, 73 F.R.D. 269, 289 (N.D. Cal. 1976). Thus, in Pfizer's view, petitioners were limited to seeking permissive intervention under Rule 24(b). If true, this would pose an even more formidable barrier to appeal, since "[i]ntervention under Rule 24(b) is addressed to the sound discretion of the trial court." *Afro American Patrolmens League v. Duck,* 503 F.2d 294, 298 (6th Cir. 1974) (citation omitted).

Because of these hurdles, decisions denying motions to intervene in the class action context are legion. *See generally* Wright, 7B *Federal Practice and Procedure,* § 1799 at 443-46

NOTES *(Continued)*

in its fulfillment of his duty." *Id.* A mere disagreement over litigation strategy does not, in and of itself, establish inadequacy of representation. *Bradley,* 828 F.2d at 1192 (citation omitted).

nn. 16-18. Thus, any rule requiring intervention as a prerequisite to appeal could operate greatly to restrict appellate review of class certification decisions and class action settlements. The fact that several of the courts of appeals have adopted a rule (in one form or another) that circumscribes the availability of such review illustrates the importance of this case and is an independent reason why review by this Court is warranted and essential.

B. The Intervention Requirement Greatly Increases The Burdens On Litigants And The Courts.

Not only does the intervention requirement restrict appellate review of the merits of class action settlements, but it also greatly increases the burdens on litigants and the courts by enmeshing them in intervention-related proceedings. Ironically, several courts have justified the intervention requirement on the theory that permitting nonintervening objectors to appeal class action settlements will render the litigation "unwieldy." *Guthrie,* 815 F.2d at 628. *Accord Croyden,* 976 F.2d at 678; *Walker,* 858 F.2d at 1074. In fact, however, the rule espoused by these courts will result in greatly protracted and burdensome class action litigation.

In jurisdictions where intervention is required in order to appeal, every class member who is represented by counsel would presumably seek to intervene to leave open the possibility of an appeal. Due to the timeliness requirement of Rule 24, the time for filing intervention motions would likely begin to run when the would-be intervenor first received notice of the proposed class settlement and the Fairness Hearing date. This would force objectors to file their motions to intervene well before the Fairness Hearing commenced, even if the motions to intervene were filed solely out of an abundance of caution. Indeed, it would likely be necessary for the district court to rule on the intervention motions prior to the Fairness Hearing, so that the court and other parties would know how to treat the would-be intervenors.

Each separate motion to intervene would be entitled to full judicial consideration. Moreover, as the courts observed in *Guthrie,* 815 F.2d at 628, and in *Walker,* 858 F.2d at 1074, an

order denying a motion to intervene as of right is a final, appealable order that must be appealed from *immediately,* or the right to appeal is lost. The result would be that if the district court denied all or some of the motions to intervene (a highly possible outcome given the difficulty of establishing inadequacy of representation at this stage of the proceeding, *see* n.17, *supra*), there could be immediate appeals of the denials of intervention, and, if a stay is granted, a postponement of the Fairness Hearing while the appeals were being resolved.

The rule requiring intervention thus results in segmented appeals. While the appeals of rulings on the motions to intervene are pending, the class may have to wait for the results of the appeals before a Fairness Hearing can be held. The benefits of the proposed settlement are potentially delayed, and possibly jeopardized, if the settling defendant experiences a reversal of fortune when the intervention appeals are being decided. In cases where the settlement provides for Class Counsel's fees to be paid out of the settlement funds obtained for the class, the class members will ultimately pay the cost of intervention-generated litigation and appeals.[17]

For these reasons, requiring intervention as a condition of appeal not only burdens and elongates Fairness Hearings, but diverts scarce judicial resources from the already complex

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17. An additional complicating factor is that the notice sent to class members typically offers little more than a thumbnail sketch of the litigation and a cursory outline of the main settlement terms. As a result, the notice often does not provide an adequate basis for class members to evaluate the adequacy of representation. It is not until the Fairness Hearing that problems in the adequacy of representation are likely to become evident to class members. This sets the stage for motions to intervene to be filed by the most skeptical class members immediately upon receiving class notice, with the probability that, if those motions are denied, and the denials are affirmed on appeal, a second wave of motions to intervene will be filed after the Fairness Hearing finally commences. The second wave of motions could bring the Fairness Hearing to another halt if they too are denied, and the denials are appealed. This startling prospect is "precisely the multiplicity of activity which Rule 23 was designed to avoid . . .." *American Pipe and Construction Co. v. Utah,* 414 U.S. 538, 550-51 (1974).

process of evaluating class actions settlements. As one commentator has aptly summarized, the intervention requirement "produces more work for the district court (a formal motion in addition to the settlement hearing), no savings of time for the appellate court (in both cases it has conducted an appeal) and results in no review of the much more basic issue (the fairness and reasonableness of the settlement) by either court." Duffy, *The Appealability of Class Action Settlements by Unnamed Parties,* 60 Univ. Chi. L. Rev. at 954. Preventing this waste is another important reason why review should be granted.

C. A Class Member Bound By A Rule 23(b)(3) Settlement Should Be Permitted To Appeal The Denial Of A Motion Filed Under Rule 60(b)(3) Alleging Fraud And Misconduct In The Procurement Of The Class Settlement.

The Sixth Circuit's order dated August 8, 1994 held that,

> "Having been denied intervenor status in this case, it follows that the appellants also lack standing to appeal the denial of the Rule 60(b) motion . . . . Although the appellants also argue that a nonparty may challenge the validity of the court's judgment where there is alleged to be a fraud upon the court, we do not believe the *special nature* of the Rule 60(b) motion warrants a different conclusion as to standing in this case where the motion seeks to vacate the very settlement as to which this court earlier concluded the appellants lacked standing to challenge." (emphasis added). 2a.

The Sixth Circuit does not explain what it means by "special nature", but it seems obvious that it has determined that class members, unlike utter strangers to the litigation, have no right to appeal *any* order of the district court absent a grant of intervention. The general rule is that even a non-party has standing to raise a challenge asserting that an adversary committed a fraud on the court if the non-party's interests are affected by the final judgment. *Kem Mfg. Corp. v. Wilder,* 817 F.2d 1517, 1521 (11th Cir. 1987). *See, also, Dunlop v. Pan American World Airways, Inc.* 672 F.2d 1044, 1052 (2nd Cir.

1982) [Person has standing to raise Rule 60(b)(3) charges if he is tantamount to being a party or so intimately bound up with the party that his rights are directly affected by the judgment]. The Sixth Circuit's own case, *Southerland v. Irons,* 628 F.2d 978, 980 (6th Cir. 1980) holds that under Rule 60(b), "[a] claim of fraud on the court may be raised by a non-party".

There is no justification for creating a restriction that is special to a member of a Rule 23(b)(3) class that requires him to intervene before he can raise the issue of fraud on the court.

III. The Decision Dismissing Petitioners' Appeal Violated Their Right To Due Process And Is Such An Extreme Departure From The Accepted And Usual Course Of Judicial Proceedings As To Call For An Exercise Of This Court's Power Of Supervision.

The third reason the writ should be granted is because, in dismissing petitioners' appeal when neither the class notice nor published Sixth Circuit decisions notified petitioners that intervention was required, the Sixth Circuit violated petitioners' right to due process, as did the Sixth Circuits' statement in its August 8, 1994 order, "We are not persuaded to the contrary by appellants' argument that a motion to reconsider the denial of their motion to intervene is pending.". The due process violations and the arbitrary nature of the Sixth Circuit's behavior are highlighted by the Sixth Circuit's denial of petitioners' request for a remand to the district court to allow it to rule upon the pending Rule 59(e) motion before the Sixth Circuit addressed petitioners' Rule 60(b)(3) related appeal. If the Sixth Circuit had remanded, regardless of the district court's ruling on the Rule 59(e) motion (seeking reconsideration of the denial of intervention), petitioners would have achieved automatic standing to appeal the denial of their Rule 60(b)(3) motion. *See, Shults, supra.* Hence, one would have grounds to argue that the Sixth Circuit manipulated the posture of the case to achieve a predetermined and desired result.

The Sixth Circuit's rulings have so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. The Notice to the Class ordered by the district court did not even hint that

intervention was required to establish appellate standing. Since Class Counsel drafted the notice, under Rule 23(a)(4), his representation of the class should be deemed inadequate per se for not alerting petitioners of the intervention requirement in the notice, and during the Fairness Hearing.

Given that due process requires that notice to a class member in a Rule 23(b)(3) class action must fully describe the action and the absent plaintiff's rights in it, *see Phillips Petroleum v. Shutts*, 472 U.S. 797, 812 (1985), and that the Sixth Circuit's own published decisions unequivocally and unanimously held that intervention was *not* required to confer standing on class members to appeal a district court decision approving a settlement, *see Sertic*, 459 F.2d at 579; *Cohen*, 127 at F.2d 724, petitioners had no reason to suspect that intervention would be a condition of appeal. Furthermore, the Sixth Circuit elevated form over substance since the district court had not only granted petitioners' formal motion to be heard at the Fairness Hearing, *see Bowling*, 143 F.R.D. at 147, but it treated petitioners the same as parties or as *de facto* intervenors throughout the proceedings. Either the district court was playing games with petitioners (which we doubt), or it, too, understood the law of the Sixth Circuit as not requiring intervention as a condition of appeal. To the extent the district court was operating under this theory, it was not alone: at least two leading commentators on class action proceedings[18] and two other circuit courts[19] had identified the Sixth Circuit as *not* requiring objecting class members formally to intervene in order to have standing to appeal.

Despite the foregoing, the Sixth Circuit dismissed petitioners' appeal because they did not intervene, and gave no meaning to the fact that petitioners had a *live* intervention motion pending through their Rule 59(e) motion. At the very least, if the Sixth Circuit required intervention, it should have remanded

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18. *See* Wright, 7B *Fed. Practice and Procedure*, § 1797 at 360-61; *Moore, 3B Moore's Federal Practice* ¶23.80[5] at 496; Note, *The Appealability of Class Action Settlements by Unnamed Parties*, 60 U. Chi. L. Rev. at 938.

19. *E.g., Bell Atlantic Corp.*, 2 F.3d at 1308 (3d Cir. 1993); *Research Corp. v. Asgrow Seed Company*, 425 F.2d at 1060 (7th Cir. 1970).

the case to the district court for it to rule on the outstanding intervention motion.

Given that Congress has conferred a statutory right to appeal from adverse decisions of district courts, 28 U.S.C. § 1291, the Sixth Circuit's arbitrary denial of that right deprived petitioners of due process of law and should not be permitted to stand. *See Pennzoil Company v. Texaco, Inc.*, 481 U.S. 1, 18 (1987) (once state has created right to appeal, civil litigant "cannot, consistent with due process, be arbitrarily denied the right to a meaningful opportunity to be heard on appeal") (Brennan, J., concurring); *Evitts v. Lucey*, 469 U.S. 387, 405 (1985) (due process requires that, once the state has created a right of appeal, it must "offer each defendant a fair opportunity to obtain an adjudication on the merits of his appeal"); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982) (Fifth and Fourteenth Amendment Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants or as plaintiffs attempting to redress grievances).

Accordingly, the petition should be granted to restore the right to due process that the Sixth Circuit denied petitioners.

CONCLUSION

The Court should grant this petition for a writ of *certiorari*.

Respectfully submitted,

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(Counsel of Record)
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Counsel for Petitioners

Date: November 6, 1994

APPENDIX

No. 94-3519

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ARTHUR RAY BOWLING, et al. Plaintiffs-Appellees,	)	FILED AUG. 8, 1994 LEONARD GREEN,
v.	)	Clerk
ELIZABETH W. RIDGEWAY; ROSEMARY GRUNSBY; FRED GRUNSBY, Class Members, on behalf of themselves and as representatives on behalf of the Pennsylvania Class Objectors Appellants,	)	ORDER
PFIZER, INC.; SHILEY, INC. Defendants-Appellees.	)	NOT RECOMMENDED FOR FULL-TEXT PUBLICATION*

* Sixth Circuit Rule 24 limits citations to specific publications. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. This notice is to be *prominently displayed if this decision is to be reproduced.*

BEFORE: MARTIN and SUHRHEINRICH, Circuit Judges; and LIVELY, Senior Circuit Judge.

The appellants in this case are members of the certified plaintiff class who objected to the settlement of this class action but who were not named as plaintiffs in the action or granted intervenor status. They appeal the district court's order denying a motion under Fed. R. Civ. P. 60(b) to set aside the settlement. Based on the dismissal of a prior appeal for lack of standing, an order issued in this case for the appellants to show cause why this appeal should not be dismissed for lack of standing. The appellants have responded to that order and also move for a remand to the district court to allow it to rule upon a pending motion to reconsider the denial of their motion to intervene. Both the class plaintiffs and the defendants in the action oppose such a remand and support dismissal of the appeal.

As we stated in dismissal of a prior appeal by these appellants, nonparty class members who object to a settlement have no standing to appeal the settlement in the absence of a grant of intervenor status. *Guthrie v. Evans,* 815 F.2d 626 (11th Cir. 1987); *see also Gottlieb v. Wiles,* 11 F.3d 1004 (10th Cir. 1993); *Loran v. Furr's/Bishop Inc.,* 988 F.2d 554 (5th Cir. 1993); *Croyden Associates v. Alleco,* 969 F.2d 675 (8th Cir. 1992), *cert. denied,* 113 S.Ct. 1251 (1993). Having been denied intervenor status in this case, it follows that the appellants also lack standing to appeal the denial of the Rule 60(b) motion. We are not persuaded to the contrary by the appellants' argument that a motion to reconsider the denial of their motion to intervene is pending. The lack of intervenor status at the time of the appeal suggests that the appellants were not "parties" when they brought the notice of appeal. *See* Fed. R. App. P. 3(c); *see also Jenkins v. Missouri,* 967 F.2d 1245 (8th Cir.), *cert. denied,* 113 S.Ct. 811 (1992). Although the appellants also argue that a nonparty may challenge the validity of the court's judgment where there is alleged to be a fraud upon the court, we do not believe the special nature of the Rule 60(b) motion warrants a different conclusion as to standing in this case where the motion seeks to vacate the very settlement as to which this court earlier concluded the appellants lacked standing to challenge.

Therefore, it is **ORDERED** that this appeal is dismissed for lack of standing. The appellants' motion to remand to the district court is denied as moot.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

Clerk

No. 94-3519

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ARTHUR RAY BOWLING, et al. Plaintiffs-Appellees,	)	FILED MAY 17, 1994 LEONARD GREEN,
v.	)	Clerk
ELIZABETH W. RIDGEWAY; ROSEMARY GRUNSBY; FRED GRUNSBY, Class Members, on behalf of themselves and as representatives on behalf of the Pennsylvania Class Objectors Appellants,	)	
v.	)	ORDER
PFIZER, INC.; SHELLEY, INC., Defendants-Appellees.	)	

Appellants, objector-class members in this product liability class action, appeal the order denying their Rule 60(b) motion seeking reconsideration of the approval of a settlement agreement. In a prior appeal, appellants sought review of the order approving the settlement. That appeal was dismissed on the ground that appellants lacked standing. *Bowling v. Pfizer, Inc.*, No. 92-3973 (6th Cir. Dec. 21, 1993). Following that dismissal, the district court denied appellants' motion to invervene on April 4, 1994. On April 12, 1994, the district court denied the Rule 60(b) motion.

Appellants' notice of appeal was filed on May 3, 1994.

Appellants have been denied permission to intervene in this action. It appears, therefore, that they lack standing to appeal the denial of the Rude 60(b) motion. *See Gottlieb v. Wiles*, 11 F.3d 1004, 1008-12 (10th Cir. 1993); *Croyden Assocs. v. Alleco*, Inc., 969 F.2d 675, 678-79 (8th Cir. 1992), *cert.*

denied, 113 S.Ct. 1251 (1993); *Guthrie v. Evans,* 815 F.2d 626, 627-28 (11th Cir. 1987). Although appellants may have standing to appeal the denial of their motion to intervene, the notice of appeal specifically states that they are appealing the April 12, 1994, denial of the Rule 60(b) motion. Consequently, it does not appear that appellants have standing to pursue this appeal. *See Wilson v. Firestone Tire & Rubber Co.,* 932 F.2d 510, 516 (6th Cir. 1991) (a party specifying a certain order in the notice of appeal is precluded from seeking review of other orders on appeal).

Appellants are hereby directed to show cause, within fourteen days of the entry of this order, why this appeal should not be dismissed for lack of jurisdiction.

ENTERED PURSUANT TO RULE 8(b)
SIXTH CIRCUIT RULES

Leonard Green, Clerk,

/s/ Leonard Green

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ARTHUR RAY BOWLING, et al., Plaintiffs,	: C-1-91-256 : ORDER DENYING : PLAINTIFFS' : 60(b) MOTION
v.	:
PFIZER, INC, et al., Defendants.	:

This matter is before the Court on the Objector Plaintiffs' Fed. R. Civ. P. 60(B) motion (doc. 315), the Non-objecting Plaintiffs' Response (doc. 326), the Defendants' Response (doc. 327), and the Objectors' Reply (doc. 333).

On March 2, 1993, the Objectors filed a motion to reconsider this Court's approval of the settlement agreement of this class action. This complex and far-reaching settlement agreement was approved after exhaustive consideration and after the Court conducted fairness hearings on June 5, 8 and 9, 1992 and July 22, 1992. We have now thoroughly reconsidered our decision approving this settlement and conclude that after careful review of the Objectors' motion, and further review of our thorough 68 page Order approving the settlement, we hereby conclude that the interest of justice dictates that the Objectors' motion be, and is, hereby DENIED.

SO ORDERED.

Dated: April 12, 1994

/s/ S. Arthur Spiegel

S. Arthur Spiegel
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ARTHUR RAY BOWLING, et al.	:	C-1-91-256
	:	
Plaintiffs,	:	
	:	ORDER
v.	:	
	:	
PFIZER, INC., et al., SHILEY, INC.	:	
Defendants.	:	

This matter is before the Court on the Objecting Pennsylvania Class' ("Movant") Motions to Intervene (doc. 265) and (doc. 267). The Movent [sic] sought leave from this Court to intervene in this action. The Court declined to rule on the motions to intervene, finding that the Court lacked jurisdiction as a notice of appeal had already been filed. The Sixth Circuit affirmed that ruling and by separate order held that the Movent [sic], as unnamed class members who had neglected to intervene in a timely fashion, lacked standing to pursue their appeal objecting to the settlement.

Accordingly, because of the substantial delay between approval of the settlement and return of this case to this Court, and the fact that intervention at this point would be prejudicial to the class, in the interest of justice, we hereby DENY the Movant's motions to intervene.

SO ORDERED

Dated April 5, 1994

/s/ Arthur Spiegel
S. Arthur Spiegel
United States District Court

No. 92-3973

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ARTHUR RAY BOWLING, et al., Plaintiffs-Appellees,	)	FILED DEC 21, 1993 LEONARD GREEN, Clerk
ELIZABETH W. RIDGEWAY, et. al., Appellants,	)	
v.	)	ORDER
PFIZER, INC., et al. Defendants-Appellees.	)	NOT RECOMMENDED FOR FULL TEXT PUBLICATION*

* Sixth Circuit Rule 24 limits citations to specific publications. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. *This notice is to be prominently displayed if this decision is to be reproduced.*

BEFORE: RYAN and SUHRHEINRICH, Circuit Judges; and LIVELY, Senior Circuit Judge.

Elizabeth W. Ridgeway, Rosemary Grunsby, and Fred Grunsby appeal the district court's order approving the settlement of this product liability class action suit. Defendants Pfizer, Inc. and Shiley, Inc. move to dismiss, pursuant to Fed. R. App. P. 27, for lack of jurisdiction.

Because the appellants are unnamed class members who neglected to intervene in the proceedings below, they lack standing to pursue this appeal. *See Guthrie v. Evans,* 815 F.2d 626, 627-28 (11th Cir. 1987); *see also Croyden Assocs. v. Alleco, Inc.,* 969 F.2d 675. 678-79 (8th Cir. 1992), *cert. denied,* 113 S. Ct. 1251. (1993); *Walker v. City of Mesquite,* 858 F. 2d 1071, 1073-75 (5th Cir. 1988). Therefore, the motion to dismiss this appeal is granted.

ENTERED BY ORDER OF THE COURT.

/s/ Leonard Green
Clerk

No. 92-3973
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ARTHUR RAY BOWLING, et al. Plaintiffs-Appellees,	)	FILED MAR 4, 1994 LEONARD GREEN,
ELIZABETH W. RIDGEWAY, et al., Appellants,	)	Clerk
v.	)	ORDER
PFIZER, INC., etc., et al., Defendants-Appellees.	)	

BEFORE: RYAN and SUHRHEINRICH, Circuit Judges; and LIVELY, Senior Circuit Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case.

Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT.

/s/ Leonard Green
Leonard Green, Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

October 3, 1994

Mr. Arthur H. Bryant
1717 Massachussets Ave., N.W.
Suite 800
Washington, DC 20036

Re: Elizabeth Ridgeway, et al.
v. Pfizer, Inc., et al.
No. 93-1912

Dear Mr. Bryant:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied. Justice O'Connor took no part in the consideration or decision of this petition.

Very truly yours,

William K. Suter, Clerk

No. 92-4297

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ARTHUR RAY BOWLING, et al.	)	FILED
	)	DEC 21, 1993
Plaintiffs-Appellees,	)	LEONARD GREEN,
	)	Clerk
ELIZABETH W. RIDGEWAY,	)	
et al.,	)	ORDER
	)	
Class Members-Appellants.	)	NOT RECOMMENDED FOR
	)	FULL TEXT PUBLICATION*
v.	)	
	)	
PFIZER, INC.; et al.	)	
Defendants-Appellees.	)	

* Sixth Circuit Rule 24 limits citations to specific publications. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. *This notice is to be prominently displayed if this decision is to be reproduced.*

BEFORE: RYAN and SUHRHEINRICH, Circuit Judges; LIVELY, Senior Circuit Judge.

Elizabeth W. Ridgeway, Rosemary Grunsby, and Fred Grunsby appeal the district court's order declining to rule on their belated motion to intervene in this class action. The appellants are unnamed class members who object to the settlement that has been reached between the plaintiff class, represented by Arthur Ray Bowling, and the defendants, Pfizer, Inc., et al. The sole issue in this appeal is whether the district court had jurisdiction to decide the appellant's motion to intervene, which was filed after their notice of appeal was filed. The members of the panel unanimously agree that oral argument is not needed. Fed. R. App. 34(a).

On September 10, 1992, the district court issued a sixty-four page opinion approving the settlement of the class action litigation. *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141 (S.D. Ohio 1992). The appellants filed a notice of appeal on September 17,

1992, and then on September 24, 1992, filed a motion to intervene in the distrrict court, Concluding that the notice of appeal divested it of jurisdiction, the district court declined to rule on the motion to intervene. The appellants now contend that under *United Airlines v. McDonald,* 432 U.S. 385 (1977), a district court retains jurisdiction to consider a motion to intervene even after a notice of appeal has been filed. We disagree.

In *McDonald,* the Supreme Court held that putative class members could intervene for the purpose of taking an appeal of the denial of class certification even though their motion was made after entry of a final judgment. *Id.* at 394-95. In *McDonald,* however, the unnamed class members moved to intervene *before* filing a notice of appeal. *Id.* at 390. In contrast, the appellants filed their motion to intervene *after* filing a notice of appeal.

As a general rule, a notice of appeal deprives the district court of jurisdiction over the action and transfers jurisdiciton to the appellate court, *Lewis v. Alexander,* 987 F.2d 392, 394 (6th Cir. 1993). In *Roe v. Town of Highland,* 909 F.2d 1097, 1100 (7th Cir. 1990), the Seventh Circuit held that there simply was no action in which a putative class member could intervene where she filed her motion to intervene on the same day that she filed her notice of appeal. We agree, and we conclude that because the appellant's notice of appeal divested the district court of jurisdiction, the district court quite correctly declined to rule on the motion.

Therefore, the district court's order is affirmed.

ENTERED BY ORDER OF THE COURT.

/s/ Leonard Green
Clerk

Case No. 94-3519

United States Court of Appeals
For the Sixth Circuit

Bowling, et al. v. Ridgeway

ISSUES TO BE RAISED ON APPEAL

1. Whether the court below erred in reconsidering its decision approving the class action settlement.

2. Whether the court below ignored or misapprehended the record when it ruled that the new facts and issues raised in Appellants' Rule 60(b) Motion had already been considered by it, when the record shows that the new facts and issues could not have been considered by the court because Appellees, (the proponents of the class action settlement) had not been truthful in providing the Court with information which the Court had relied upon in its order approving the class action settlement and class certification; and the record shows further that the new facts and issues raised in the 60(b) Motion had been kept secret and hidden from the court by the Proponents during the Fairness Hearings.

3. Whether the court below erred in failing to consider newly found evidence raised in Appellants' Rule 60(b) Motion of Defendants' fraudulent "Good Manufacturing Practices" upon the Food and Drug Administration relating to Defendants' heart valves.

4. Whether the court below erred in failing to consider newly found evidence that Appellees misled the court about whether the Courts of California would allow persons with heart valves in other states to sue the Defendants in California.

5. Whether the court below erred in failing to consider newly found evidence raised in Appellants' Rule 60(b) Motion concerning the Appellees' failure to provide the court below with a true account of Defendants' prior medical research activities and the impact of such research on the terms of the class action settlement.

6. Whether the court below erred in failing to address the issue raised in Appellants' Rule 60(b) Motion that the Defendants misled the court and the class concerning Defendants' unwillingness to settle "pre-fracture" cases for substantial sums.

7. Whether the court below erred in failing to address the issue raised in Appellants' Rule 60(b) Motion concerning Defendants failure to reveal the existence of criminal and civil investigations by the United States Department of Justice into Defendants' acts of fraud in connection with Defendants' heart valve related activities.

8. Whether the court below erred in failing to address the issue raised in Appellants' Rule 60(b) Motion that Class Counsel misrepresented to the court the extent of the documents and other material he had access to and received prior to agreeing to the terms of the class action settlement and certification.

9. Whether the court below erred in denying the Appellants request that it issue a certification requesting a remand for purposes of ruling on Appellants' Rule 60(b) Motion, as authorized in *Bank of Salem, Ohio v. Hirsch*, 535 F.2d 434 (6th Cir. 1976).

10. Whether the court below failed to conduct the required inquiry and otherwise erred in the procedure and process it utilized in determining whether to issue a certification requesting a remand for purposes of ruling on Appellants' Rule 60(b) Motion as authorized in *Bank of Salem, Ohio v. Hirsch*, 535 F.2d 434 (6th Cir. 1976).

11. Whether the court below erred in the procedure and process it utilized to consider Appellants' request that it issue a certification authorizing a remand of this case from the Sixth Circuit Court of Appeals when it undertook no inquiry and allowed no hearings.